

Quill — Stare at the Decision

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All too often the debate regarding a remote seller's obligation to collect use tax seems to center around the "burdens" placed on the remote seller associated with collecting, reporting, and remitting tax and whether those burdens have been materially reduced (or have vanished). Although that burden question may be paramount in the context of tax policy issues that Congress should or should not address, it is important to remember that the burden issue is irrelevant under current law. Nevertheless, the debate regarding burdens has again resurfaced¹ in the wake of the federal district court's decision in *The Direct Marketing Association v. Huber*² and the cross-motions for summary judgment that were just made.

In a recent letter to the editor, a commentator criticized the federal district court's decision by saying that "under Judge Blackburn's reasoning, any measure intended to promote use tax collection is inherently invalid because of its purpose, no matter how slight the resulting burden" and that "a requirement that serves a use-tax-collection purpose is invalid if it is unduly burdensome. But any such conclusion requires an assessment of the actual burdens, which Judge Blackburn did not provide."³ Although the commentator's observation of what

Judge Blackburn's opinion lacked may be correct as a factual matter, its legal significance is questionable if one is willing to accept the obvious — that the statute at issue was an attempt to coerce remote sellers to collect Colorado's use tax. Under *Quill*,⁴ "an assessment of the actual burdens" is not required; physical presence is a bright-line rule and the law of the land. While that is generally understood, what is often overlooked is *why* the physical presence standard reaffirmed in *Quill* is the law of the land (that is, what compelled the court to uphold a bright-line rule) and what that means for the current debate. This article aims to put the *why* back into focus.

What is often overlooked is why the physical presence standard reaffirmed in Quill is the law of the land (that is, what compelled the court to uphold a bright-line rule) and what that means.

It has been argued that the increased economic importance of the remote sales market, the continuing development of the Internet, and the sophistication of tax compliance technology render the physical presence standard under *Quill* an artifact.⁵ Indeed, many⁶ have expressed and continue to express an interest in "overturning" *Quill* through litigation in the absence of congressional legislation that would authorize states to require out-of-state sellers (those without physical presence) to collect

¹See Alan D. Viard, "Colorado 'Amazon' Decision Criticized," *State Tax Notes*, Feb. 21, 2011, p. 579, *Doc 2011-3226*, or *2011 STT 35-7*.

²See *The Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo., Jan. 26, 2011) (Order Granting Motion for Preliminary Injunction). On January 26, 2011, the U.S. District Court for the District of Colorado granted a motion for preliminary injunction filed by the Direct Marketing Association (DMA), thereby enjoining the Colorado Department of Revenue from enforcing its sales and use tax notification and reporting regime.

³See *supra* note 2 (citing *The Direct Marketing Association v. Huber*).

⁴*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁵See, e.g., Unofficial Transcript Available of Tax Analysts' Conference on 'Amazon' Law (discussing how technological advances in the Internet age render *Quill* obsolete).

⁶See "AICPA Panel Examines Alternatives to Federal Streamlining Legislation," *State Tax Notes*, Nov. 1, 2010, p. 311, *Doc 2010-23320*, or *2010 STT 208-2*; see John Buhl, "Governing Board Studying Option of Overturning *Quill* in Court," *State Tax Notes*, Nov. 8, 2010, p. 386, *Doc 2010-23498*, or *2010 STT 210-1*; see John Buhl, "State Taxes 2010: Change States Believed in, but Could Not Implement," *State Tax Notes*, Jan. 3, 2011, p. 7, *Doc 2010-27044*, or *2010 STT 247-1*.

and remit sales tax. Some commentators share that interest, advocating *Quill's* demise.⁷ And some states, like Oklahoma, are taking a slightly different approach, attempting to circumvent *Quill* by enacting onerous reporting and affiliate nexus provisions, and going as far as to self-servingly declare that its provisions as amended affirmatively *do not* place an undue burden on out of state retailers.⁸ All that flies directly in the face of well-settled law that must be respected because of basic principles of *stare decisis*.

The term “*stare decisis*” literally means “to stand by things decided” and generally refers to the practice of following prior court decisions unless there are unusual circumstances.⁹ Its importance in American jurisprudence cannot be understated and is best explained in the words of Justice Brandeis:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.¹⁰

The *Quill* decision was much more than merely an analysis of the burden on interstate commerce and the compliance difficulties associated with sales and use tax collection. It was a decision also grounded in fundamental and foundational jurisprudential principle — *stare decisis* — a doctrine that has its importance apart from the commerce clause issue raised in *Quill*, a doctrine that acknowledges “it is more important that the applicable rule of law be settled than that it be settled right.”¹¹ What is often ignored, or at the very least discounted, by those engaged in the ongoing debate surrounding remote seller nexus is that *Quill* was heavily, if not primarily, influenced by that rule of law and the reliance of an entire industry on the physical presence standard previously articulated in *National Bellas Hess v. Department of Illinois*.¹² It is misguided to argue that the continuing development of the Internet and the sophistication of tax compliance and remote selling technology (that is, remote sellers can customize delivery, packaging, marketing, and discounts and can easily compute local sales tax rates) renders the physical presence standard under *Quill* an artifact;

that argument ignores one of the fundamental tenets of the Court’s holding in *Quill*.

Although it seems that the Court’s *Quill* decision was based largely on *stare decisis* grounds, it is important to note that physical presence is the only appropriate constitutional standard for state tax jurisdiction and would be so even if *National Bellas Hess* had never been decided and/or the principle of *stare decisis* did not exist. Whether the context is sales tax collection obligations or business activity tax liability, a state’s taxing regime may properly reach only those activities that actually occur within that state’s boundaries (remember that even unitary apportionment, for example, is merely an accounting tool to determine the portion of total income earned by multiple entities or in multiple jurisdictions that was earned by activities within the taxing state). State governments furnish meaningful protections and benefits only to those persons that are within its borders, whether they be individuals or businesses and whether they be in the role of sellers or buyers.

We have seen this all before. In fact, all of the arguments advanced today for overturning *Quill* were advanced as reasons for overturning *National Bellas Hess*, and all of which were rejected by the Court. The observations made by the North Dakota Supreme Court and fully considered by the U.S. Supreme Court are precisely the arguments that are being made today to support overturning *Quill*. Does the nature of technology today warrant a different result? In fact, the Court even agreed with the North Dakota Supreme Court regarding the observations that are similarly being made today (for example, technology is improving, potentially leading to more remote sales and fewer compliance burdens) but decided to reverse the state court’s decision instead of overturning *Bellas Hess*.¹³ The notion that we are in some “new” position today that warrants a different outcome fails to recognize the fundamental nature of the Court’s decision. The mere fact that the “compliance burdens” on out-of-state sellers arguably have been reduced through the advancement of technology (that is, most large businesses are capable of collecting taxes on remote sales) or the fact that remote sellers can readily ascertain each local rate of tax adds fodder to the debate and may spur a few more articles and contribute to the broader policy discussions, but technological advances do little to put the continuing validity of the Court’s holding in doubt.

One can put aside the doctrine of *stare decisis* to discuss policy and environmental changes in the legislative context, but that discussion in the context of state statutes and related litigation is merely academic; the right policy answer is of little consequence in those contexts. When one understands *Quill's* true

⁷See David Brunori, “It’s Time to Overturn *Quill*,” *State Tax Notes*, Feb. 15, 2010, p. 497, *Doc 2010-2948*, or *2010 STT 30-2*.

⁸Okla. Stat. tit. 68 section 1407.5(C).

⁹*Black’s Law Dictionary* (9th ed. 2009).

¹⁰*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407, 410 (1932) (Brandeis, J., dissenting).

¹¹*Burnet*, 285 U.S. at 406-407.

¹²386 U.S. 753 (1967).

¹³*Quill*, 504 U.S. at 302.

holding, it becomes apparent that *stare decisis* should terminate the debate outside the legislative arena. Amid the various calls for *Quill's* enshrinement, we must keep in mind this fundamental doctrine. Even if we assume that *Quill* has been outpaced by the current business environment, the inquiry is “whether the rule has proven to be intolerable simply in defying practical workability [and] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”¹⁴

The following quotes from *Quill* illustrate just how little has changed and how *Quill* has hardly become “a remnant of abandoned doctrine” almost 20 years later. A second look at this case (or at least the excerpts) might limit another round of litigation of issues that have already been decided:

The principal economic change noted by the [North Dakota] court was the remarkable growth of the mail-order business “from a relatively inconsequential market niche” in 1967 to a “Goliath” with annual sales that reached “the staggering figure of \$183.3 billion in 1989.” *Id.*, at 208, 209. Moreover, the court observed, advances in computer technology greatly eased the burden of compliance with a “welter of complicated obligations” imposed by state and local taxing authorities. *Id.*, at 215 (quoting *Bellas Hess*, 386 U.S., at 759-760).¹⁵

Any bright-line rule will, by its very nature, be open to challenge by states and commentators alike. But again, the Court considered the issues associated with bright-line tests. The Court acknowledged the artificiality of a bright-line rule and the difficulties associated therewith, mirroring the states’ current frustrations. However, the Court upheld the physical presence standard noting its benefits “more than offset its artificiality.”¹⁶

Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a “quagmire” and the “application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable

power of taxation.” *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959).¹⁷

The Court went on:

Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. Indeed, it is not unlikely that the mail-order industry’s dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.¹⁸

In upholding *Bellas Hess*, the Court was persuaded by the substantial reliance interests that would have been upset had the bright-line test been abandoned were the Court to overrule *Bellas Hess*:

The *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry. The “interest in stability and orderly development of the law” that undergirds the doctrine of *stare decisis*, see *Runyon v. McCrary*, 427 U.S. 160, 190-191 (1976) (Stevens, J., concurring), therefore counsels adherence to settled precedent.¹⁹

Indeed, the Court considered cases in which bright-line tests were abandoned in favor of more nuanced balancing tests, but declined to do so in *Quill*. Why? Because of *stare decisis* and because of the substantial reliance interests that have become “part of the basic framework of a sizeable industry.”²⁰ The Court concluded that “the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law” despite technological advances and even though the same burdens were not present in 1992 as they were in 1967. Those same reliance interests exist now more than ever. Indeed, the technological advances are similar in scope and magnitude, and the industry that relies on the articulated bright-line test is more robust than ever.

On the strength of *stare decisis*, some of the Justices thought the Court should not have even addressed the merits of the case, advocating instead strict adherence to *Bellas Hess*. From the concurrence of Justices Scalia, Thomas, and Kennedy:

I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*. *American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 204 (1990)

¹⁴*Planned Parenthood v. Casey*, 505 U.S. 833, 854-855 (U.S. 1992) (internal citations omitted).

¹⁵*Quill*, 504 U.S. at 303.

¹⁶*Quill*, 504 U.S. at 315.

¹⁷*Quill*, 504 U.S. at 315-316.

¹⁸*Quill*, 504 U.S. at 316.

¹⁹*Quill*, 504 U.S. at 317.

²⁰*Quill*, 504 U.S. at 317.

(Scalia, J., concurring in judgment). Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has “special force” where “Congress remains free to alter what we have done.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989). See also *Hilton v. South Carolina Pub. Railways Comm’n*, 502 U.S. ___, __ (1991) (slip op., at 4); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Moreover, the demands of the doctrine are “at their acme . . . where reliance interests are involved,” *Payne v. Tennessee*, 501 U.S. ___, __ (1991) (slip op., at 18). As the Court notes, “the *Bellas Hess* rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry.” *Ante*, at 17.²¹

What is often lost in the current state statutory/litigation debate is that in *Quill*, the Court opened the door wide for Congress to change the law. In fact, the Court even acknowledged that in *Bellas Hess*, they could have been wrong and that because Congress had the power to change the law, they were less likely to overturn existing precedent.²² The Court stated:

This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.²³

Congress still has the ability to change the decision, *Bellas Hess* is still “well reasoned,” and Congress is continually asked to enact legislation.

Would the Court overrule *Quill* now even though it failed to do so then? Does the passage of almost 20 years really put into question the “reasoning” of *Bellas Hess*, or somehow take away from the fact that Congress can act if it sees fit? We note that the passage of nearly 25 years (the time between *Bellas Hess* and *Quill*) did little to affect the Court’s sense as to the quality of its reasoning or its need to overturn existing precedent. It is Congress’s door to walk through.

²¹*Quill*, 504 U.S. at 319-320.

²²*Quill*, 504 U.S. at 319; see also, *Burnet*, 285 U.S. at 406-407 (acknowledging the Court will adhere to *stare decisis* unless “correction through legislative action is practically impossible”).

²³*Quill*, 504 U.S. at 318 (internal citations omitted).

Consider the following interaction between the Court and Quill’s counsel, John Gaggini,²⁴ in response to Gaggini’s assertion that the burdens faced by Quill were the same as those faced by National *Bellas Hess* and ponder whether anything has changed. We suggest nothing has:

Question: Well, I’m sure they are. But maybe we were wrong in 1967. Is there some reason why we would — should be more reluctant to change in this case than we ordinarily would be, or less reluctant? What kind of a case — this is — was a constitutional decision, right? And we have opinions that say that ordinarily where we think we’ve gotten it wrong there and are wrongly preventing the States here from doing something they ought to be able to do that we should ‘fess up and [*18] change our — change our opinion.

Mr. Gaggini: Yes, Your Honor, and I would agree with you except this case is distinguishable. In this case, we submit that based on the jurisprudence, *Bellas Hess* was well reasoned in 1967. There may be a dispute as to which way the Court should have gone, but it was well reasoned. It provided a workable framework, a framework where taxpayers, State administrators, and courts have followed for over 25 years.

Question: Well, you might go beyond that, Mr. Gaggini, rather than just saying the merits were rightly decided. This, *unlike a lot of our constitutional decisions*, *Bellas Hess is a decision which Congress can overrule, the same way it provided in the case we heard argued earlier. Congress — if Congress wants to change the result in Bellas Hess, it can do so, and it’s been asked to do so by the State.*²⁵

Later in the transcript Mr. Nicholas Spaeth, the state’s attorney, engages in a similar dialogue with the Court:

Mr. Spaeth: I was speaking about the political realities, Chief Justice Rehnquist. There are so many special interest groups involved in this. And that — in a situation where there’s a lot of money at stake for Congress —

Question: Well, that’s the way the game goes.

Mr. Spaeth: That’s right. But the problem is not Congress. The problem is this Court and a 25-year-old decision, which the Direct Marketing Association uses today to tell Congress that it’s a due process case and you don’t have the power to change the result through legislation.

²⁴*Quill* was litigated by McDermott Will & Emery and Mr. Gaggini is a member of the MWE State and Local Tax practice.

²⁵1992 U.S. Trans. LEXIS 189, 18-19 (emphasis added).

Question: Well, if we were to reverse the Supreme Court of North Dakota here, say that *Bellas Hess* is still good law, but that was based on the commerce clause, not the due process clause, would that solve some of your problems?

Mr. Spaeth: Well, that would give me half a loaf, Chief Justice Rehnquist.

Question: Better than none.

Mr. Spaeth: It's better than none, but as you might understand, I'm hoping for the whole loaf [*26] here today.²⁶

To borrow from Spaeth, the Court gave the states half a loaf of bread (opening the door to congressional action); they need to get the other half from Congress. From the Court's perspective its job is done; it has already spoken.

It seems clear that the Court will continue deferring to Congress to resolve the nexus issue presented in *Quill* unless the Court is faced with a state Supreme Court decision that directly contradicts *Quill*.

It seems clear that the Court will continue deferring to Congress to resolve the nexus issue presented in *Quill* unless the Court is faced with a state supreme court decision that directly contradicts *Quill*. One would hope that such a case would be highly unlikely and would require the state supreme court to either knowingly ignore Supreme Court precedent or distinguish the case from *Quill* in a creative (read, disingenuous) fashion.²⁷

Further insight into the Court's unwillingness to throw its hat into the nexus ring is evidenced by *Revenue Cabinet v. Asworth Corp. et al.*,²⁸ in which the taxpayers asked the Court to clarify *Quill*. This case arguably presented a favorable vehicle with which to present the nexus issue to the Court; it is not an outright attack on *Quill* but includes an issue

concerning non-curative retroactive tax legislation that implicated *Quill*. The Court declined to take the case despite being presented with another pressing issue and an avenue to comment on the substantial nexus standard. The Court's denial was not all that surprising considering its past unwillingness to review state supreme court decisions that raise the direct tax substantial nexus debate.²⁹ It seemed counterintuitive to think that the Court would take a retroactivity case, disturb *Quill* in the process, and then create more litigation surrounding the retroactivity issue.

Indeed, although not explicit in the opinion,³⁰ the Court was troubled by the idea that overturning *Bellas Hess* could result in retroactive tax levies, and that likely factored into the Court's decision. Consider another interaction at oral argument:

Question: Would that involve potential retroactive liability covering several years and in a large number of the States, General Spaeth?

Mr. Spaeth: It might. And obviously I can't speak for all the States on this. And it would, of course, depend —

Question: It would be a very substantial amount, would it not?

Mr. Spaeth: It could be. And of course it depends on how the States, and this Court ultimately, because I suspect it would come back here, [*24] would apply *Chevron* and *Jim Beam*, and in a way to determine —

Question: Well, I suppose you've seen the handwriting on the wall there?

Mr. Spaeth: Yes. And we're quite pleased with the handwriting so far.

(Laughter.)

Mr. Spaeth: But the retroactivity issue, of course, is not in front of you. This case arose in a declaratory judgment action. We have not assessed *Quill* for anything at this point in time.

Question: Of course it bears on it in this way: if *National Bellas Hess* rests on the — dormant

²⁶1992 U.S. Trans. LEXIS 189, 25-26.

²⁷*Quill*, 504 U.S. at 321 ("We have recently told lower courts that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [they] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

²⁸2009 Ky. App. LEXIS 229 (Ky. Ct. App. Nov. 20, 2009), cert. denied 131 S. Ct. 1046 (2011). The Court may soon have a further opportunity to address (or not to address) the nexus issue. See *KFC Corp. v. Iowa Dep't of Rev.*, 792 N.W.2d 308 (Iowa 2010). It is the authors' understanding that the taxpayer intends to file a petition for cert.

²⁹See, also, e.g., *A & F Trademark, Inc. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), cert. denied, 546 U.S. 821 (2005); *Lanco, Inc. v. Director, Div. of Tax.*, 879 A.2d 1234 (2005), aff'd, 908 A.2d 176 (2006), cert. denied, 551 U.S. 1131 (2007); *Tax Comm'r v. MBNA Amer. Bank, N.A.*, 640 S.E.2d 226 (2007), cert. denied sub nom, *FIA Card Services N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007); *Geoffrey, Inc. v. Comm'n of Rev.*, 899 N.E.2d 87 (2009), cert. denied, 129 S. Ct. 2853 (2009); *Capital One Bank v. Comm'n of Rev.*, 899 N.E.2d 76 (2009), cert. denied, 129 S. Ct. 2827 (2009).

³⁰See, *Quill*, 504 U.S. at footnote 10 (acknowledging the danger of retroactive taxes stating, "An overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated ability for mail-order houses").

commerce clause, certainly Congress can take care of this problem, and it could rightfully weigh the really massive concerns here for retroactive liability and try to sort it out in a fair and reasonable way.

Mr. Spaeth: That's the problem —

Question: Now, that's not going to happen if this Court decides to jump the gun and turn the tide.

Mr. Spaeth: The problem, Your Honor, is that Congress is, as this Court well knows, ill suited to weigh the complexities of this decision.

Question: They're much better suited to do than we are because they can deal with the retroactivity problem.

Mr. Spaeth: But every time this issue has been presented to Congress it's been stalemated — in no small [*25] part because the Direct Marketing Association has argued *Bellas Hess* is a due process case.

Question: But that doesn't mean the Congress is ill suited to do it, just because it doesn't pass the law that you want.

(Laughter.)

One has to wonder whether Spaeth's inability to set the Court's minds at ease regarding the retroactivity issue factored into the Court's decision. Those directly involved in the case seem to think it mattered.³¹ In fact, Alan Friedman, a lawyer from the Multistate Tax Commission who served as a special assistant attorney general for North Dakota to work on *Quill*, thought “immediately after the argument that [the retroactivity issue] could tip the case against the states.”³² In today's economic climate in which state budget shortfalls are widespread, it seems more likely than not that retroactive levies would result if *Quill* were overturned. The Court would have the same concern today, and it is arguable that the concern is even more prevalent.

It has also been suggested that the Court may be willing to review a case dealing with the “Amazon” law adopted in New York and a few other states (and to a lesser extent Colorado's reporting regime). Regardless of the packaging, the Court is very unlikely to open the *Quill* box based largely on the doctrine of *stare decisis*.³³ In fact, the Court pretty much made

it clear that its decision was based on pragmatic considerations. The current state of the law is exactly what the Court anticipated, absent congressional intervention.

Similarly, we question the notion that recent litigation surrounding Colorado's attempt to require out-of-state sellers to disclose consumer information³⁴ will entice the Supreme Court to review a state tax nexus case with an eye toward disturbing *Quill*.³⁵

The Court conceded that “contemporary *Commerce Clause* jurisprudence might not dictate the same result were the issue to arise for the first time today.”³⁶ Nevertheless, the Court declined to overturn *Bellas Hess*, and the driving force behind that decision was *stare decisis*. Even if the Court believed that there was no warrant for the physical presence nexus standard were it a matter of first impression, *stare decisis* nonetheless favored adherence to the rule of *Bellas Hess*.

The proper venue to address *Quill*— if that effort is appropriate at all — is through the legislative process. The real question is not whether the technological advances will result in a court overturning *Quill*, but rather whether the technological advances prove an impetus for congressional action. That remains to be seen. With the continued growth of e-commerce, the present budgetary constraints, and the low-hanging fruit that is the taxation of e-commerce, it is not entirely unlikely that a powerful legislative movement takes further hold. Indeed, a major product of this movement is embodied in the Streamlined Sales and Use Tax Agreement and the related Main Street Fairness Act, even if its ultimate success is far from clear. Perhaps we should keep in mind the following passage from the concurrence of Justices Scalia, Thomas, and Kennedy and, one would hope, avoid another decade of litigation involving an issue that has already been decided:

Having affirmatively suggested that the “physical presence” rule could be reconciled with our new jurisprudence, we ought not visit economic hardship upon those who took us at our word.³⁷ ☆

³¹See Billy Hamilton, “Remembrance of Things Not So Past: The Story Behind the *Quill* Decision,” *State Tax Notes*, Mar. 14, 2011, p. 807, *Doc 2011-4390*, or *2011 STT 49-4*.

³²See *supra* note 31.

³³See Edward A. Zelinsky, “The Siren Song of ‘Amazon’ Laws: The Colorado Example” *State Tax Notes*, Mar. 7, 2011, p. 695, *Doc 2011-3777*, or *2011 STT 44-2* (concluding the same).

³⁴See *The Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo., Jan. 26, 2011) (Order Granting Motion for Preliminary Injunction). On January 26, 2011, the U.S. District Court for the District of Colorado granted a motion for preliminary injunction filed by DMA, thereby enjoining the Colorado DOR from enforcing its sales and use tax notification and reporting regime.

³⁵See Dolores W. Gregory, Steven Roll, and William Carlisle, “Tough Economy, Waning Prospects For Federal Legislation May Increase Interest in Alternatives to Streamlined System,” 225 *BNA Daily Tax Rpt.*, J-1 (Nov. 24, 2010).

³⁶*Quill*, 504 U.S. at 311.

³⁷*Quill*, 504 U.S. 319.